

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

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|---------------------------------|---|-------------------------------------|
| RICHARD GERBER, | : | CIVIL ACTION NO. 1:14-CV-674 |
| | : | |
| Plaintiff | : | (Chief Judge Conner) |
| | : | |
| v. | : | |
| | : | |
| WARDEN WILLIAM CAMPBELL, | : | |
| <i>et al.,</i> | : | |
| | : | |
| Defendants | : | |

ORDER

AND NOW, this 18th day of June, 2015, upon consideration of the report (Doc. 23) of Magistrate Judge Susan E. Schwab, recommending the court grant in part and deny in part the motion (Doc. 14) to dismiss plaintiff's *pro se* amended complaint (Doc. 7) pursuant to Federal Rule of Civil Procedure 12(b)(6) filed by defendants Warden William Campbell and A. Burd,¹ wherein Judge Schwab opines that the bulk of plaintiff's claims, with the exception of a single retaliation claim against defendant Campbell, are meritless and should be dismissed, (see Doc. 23 at 11-30), and, following an independent review of the record, the court in agreement with Judge Schwab that a large majority of plaintiff's claims are either meritless or barred by the doctrine of qualified immunity, and it appearing that neither party

¹ A third defendant, identified in the amended complaint as "First Shift Nurse (Name Unknown)," has now been identified by defendants as Kelly Henry. (See Doc. 19 at 2 n.1). Magistrate Judge Schwab has separately ordered plaintiff to provide an address for Kelly so that the amended complaint (Doc. 7) can be served on her.

has objected to the report, and that there is no clear error on the face of the record,² see Nara v. Frank, 488 F.3d 187, 194 (3d Cir. 2007) (explaining that the failure to timely object “may result in forfeiture of *de novo* review at the district court level”), it is hereby ORDERED that:

1. The report (Doc. 23) of Magistrate Judge Schwab is ADOPTED.
2. Defendants’ motion (Doc. 14) to dismiss plaintiff’s amended complaint (Doc. 7) is GRANTED in part and DENIED in part to the following extent:
 - a. The motion is GRANTED in its entirety with respect to defendant Burd. All claims against defendant Burd in the amended complaint (Doc. 7) are DISMISSED.

² When parties fail to timely object to a magistrate judge’s report and recommendation, the Federal Magistrates Act does not require a district court to review the report before accepting it. See Thomas v. Arn, 474 U.S. 140, 149 (1985). As a matter of good practice, however, the Third Circuit expects courts to “afford some level of review to dispositive legal issues raised by the report.” Henderson v. Carlson, 812 F.2d 874, 878 (3d Cir. 1987). The advisory committee notes to Rule 72(b) of the Federal Rules of Civil Procedure indicate that “[w]hen no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” Fed. R. Civ. P. 72(b), advisory committee notes; see also Henderson, 812 F.2d at 878-79 (stating that “the failure of a party to object to a magistrate’s legal conclusions may result in the loss of the right to *de novo* review in the district court”); Tice v. Wilson, 425 F. Supp. 2d 676, 680 (W.D. Pa. 2006) (holding that the court’s review is conducted under the “plain error” standard); Oldrati v. Apfel, 33 F. Supp. 2d 397, 399 (E.D. Pa. 1998) (holding that the court will review the report and recommendation for “clear error”); Cruz v. Chater, 990 F. Supp. 375, 377 (M.D. Pa. 1998) (holding that the court’s review is limited to ascertaining whether there is “clear error on the face of the record”). The court reviews the Magistrate Judge’s report in according with this Third Circuit directive.

- b. The motion is GRANTED in part with respect to defendant Campbell. Plaintiff's Eighth Amendment and Due Process Clause claims and plaintiff's request for punitive damages against defendant Campbell are DISMISSED.
 - c. The motion is DENIED to the extent it seeks dismissal of plaintiff's retaliation claim against defendant Campbell.
- 3. The above-captioned matter is REMANDED to Magistrate Judge Schwab for further proceedings.

/S/ CHRISTOPHER C. CONNER

Christopher C. Conner, Chief Judge
United States District Court
Middle District of Pennsylvania